

THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Environment

In an action for contribution and cost recovery under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), a landowner filed an action against the operator of an edible oils refinery. Judge Dennis James Hubel held that plaintiff could maintain an action for contribution under § 113 of CERCLA, it could not pursue a claim for response costs under CERCLA § 107. In so holding, the court rejected plaintiff's argument that the court should adopt an exception recognized in the Seventh Circuit for property owners that had no knowledge of hazardous disposals at the site and who purchased the property after the contamination. Judge Hubel found that such an exception would be inconsistent with Ninth Circuit precedent and further, that plaintiff would fail to qualify for the exception since it was aware of contamination at the site prior to leasing the property to the defendant. Schnitzer Investment Corp. v. Time Oil Co., CV 98-1564-HU (F & R, April 6, 1999 - 11 pages; Adopted by Order of Judge King, April 28, 1999 - 2 pages).

Plaintiff's Counsel: Lori Irish Bauman
Defense Counsel: Patricia Dost,
Daniel O'Leary, Mark Reeve

Social Security

Judge Malcolm Marsh held that a mental health counselor not acting

directly under the supervision of a psychologist or psychiatrist was not an "acceptable medical source" under social security regulations. Thus, the Administrative Law Judge did not err when he failed to reject the counselor's opinion by setting forth clear and convincing reasons, the standard applicable to the rejection of a treating physician's opinion. Finch v. Apfel, CV 98-877-MA (Order, April 26, 1999 - 10 pages).

Plaintiff's Counsel: Alan Stuart Graf
Defense Counsel: Renee McFarland

Fraud Pleading

Judge Helen Frye held that Fed. R. Civ. P. 9(b)'s heightened pleading requirement applied to a *qui tam* action filed under the False Claims Act, 31 U.S.C. § 3729. The court found that plaintiff failed to adequately identify the time, date or participants in the allegedly fraudulent conduct, nor did he explain how the conduct resulted in false claims to the government. The court granted plaintiff 30 days' leave to file an amended complaint. Palchikovskiy v. Oregon Health Sciences University, CV 97-1784 (Opinion, April 19, 1999 - 6 pages).

Plaintiff: Pro Se
Defense Counsel: Janet Billups

Immigration

Petitioner, a lawful permanent alien, was convicted of a drug

offense in 1993. In March 1996, the INS issued an order to show cause, alleging that plaintiff was deportable under amendments to the Immigration and Naturalization Act (INA) enacted in April 1996 as part of the Antiterrorism and Effective Death Penalty Act (AEDPA). The INS ruled that plaintiff was barred from applying for humanitarian relief from deportation because the AEDPA foreclosed him from doing so. Petitioner filed a petition for writ of habeas corpus, a complaint for declaratory and injunctive relief, and a motion for stay of deportation. Judge Redden held that because plaintiff was in deportation proceedings before the AEDPA became effective, retroactive application of the AEDPA to bar his application for relief from deportation was a violation of due process. The court also held that the INS's interpretation of recent amendments to the INA to bar aliens facing deportation, but not aliens in exclusion proceedings, from seeking humanitarian relief was a violation of equal protection. Judge Redden also considered whether the court retained its habeas corpus jurisdiction after the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which eliminated a provision of the Immigration and Naturalization Act (INA) that had provided habeas

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relief for aliens facing deportation. There is presently no authority from the Ninth Circuit on this issue; the court's opinion in Hose v. INS, 141 F.3d 932 (9th Cir. 1998) has been withdrawn for rehearing en banc and the opinion in Magana-Pizano v. INS, 152 F.3d 1213 (9th Cir. 1998) was vacated by the Supreme Court for reconsideration in light of Reno v. American-Arab Discrimination Committee, 525 U.S. ___, 119 S.Ct. 936 (1999). Judge Redden concluded that the elimination of the habeas provision from the INA did not affect the court's habeas jurisdiction under 28 U.S.C. § 2241. Mercado-Amador v. Reno, Civ. No. 98-1593-RE (Opinion and Order, May 4, 1999 - 14 pages).

Plaintiff's Counsel: Jeffrey Noles,
Robert Neale
Defense Counsel: Craig Casey,
Russell Verby

Intellectual Property

Judge Donald Ashmanskas issued a detailed opinion discussing what constitutes willful infringement and other issues relative to contract and trademark claims and defenses. The court declined to impose a constructive trust. Thayer v. Nydigger, CV 95-2004-AS (Opinion, April 19, 1999 - 43 pages).

Plaintiff's Counsel: William Bailey
Defense Counsel: Allen Field

Limitations

A pro se plaintiff who was dissatisfied with the reports of her doctors, filed a fifth action against them and their hospitals claiming violations of the ADA, the Rehabilitation Act, RICO and civil rights violations under 42 U.S.C. § 1983. Plaintiff alleged that the doctors failed to review her entire medical chart prior to issuing medical reports and that as a consequence, their reports were false and misleading. Plaintiff claimed that she was damaged because the Workers Compensation Board and the Social Security Administration denied her request for benefits based upon the defendants' reports.

Judge Ann Aiken dismissed all claims finding that they were barred by the applicable statute of limitations. Although the ADA and Rehabilitation Acts include no express limitations period, Judge Aiken looked to analogous state law and held that Oregon's two year limitations period applicable to tort claims should apply. The court dismissed the RICO and § 1983 claims on grounds that they too were time barred and for failure to state claims. Benson v. Feldstein, CV 98-677-AA (Opinion, April, 1999 - 12 pages).

Plaintiff Pro Se
Defense Counsel: Tom Tongue,
Janet Schroer

Civil Rights

A motorcycle club and one of its members filed an action against the City of Portland challenging the City's General Order regarding gang affiliation designations by the Portland Police Bureau. Plaintiffs sought to enjoin enforcement of the policy which would have excluded them from public events based solely upon their club membership and/or wearing club colors.

The City moved to dismiss on grounds that the claims were not ripe since neither the club nor any of its members had actually been designated under the gang program. Judge Ann Aiken denied the motion, noting that a separate agency had in fact designated the club as a gang and that agency regularly shared its information with the gang team.

The court also denied plaintiffs' motion for a preliminary injunction finding no evidence of imminent irreparable injury. On the merits, the court found plaintiff unlikely to prevail on their due process claim since the alleged government action was directed solely at plaintiffs' reputational interest. West v. City of Portland, CV 99-315-AA (Opinion, May, 1999 - 11 pages).

Plaintiffs' Counsel: Spencer Neal
Defense Counsel: Bill Manlove

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